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No. 97-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

RANDALL RICCI,

Petitioner,

v.

VILLAGE OF ARLINGTON, HEIGHTS
A MUNICIPAL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH N. FLAXMAN
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603
(312) 427-3200
Attorney for Petitioner

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QUESTIONS PRESENTED

1. Does the reasonableness clause of the Fourth Amendment incorporate the common law rule prohibiting warrantless arrests in misdemeanor cases that do not involve a breach of the peace?

2. May a municipality, consistent with the reasonableness clause of the Fourth Amendment, require its police officers to make full custodial arrests for an alleged violation of a fine only license ordinance "in order to ensure compliance with the ordinance?"

INDEX

TABLE OF AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioner Randall Ricci respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 20, 1997.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-9) is reported at 116 F.3d 288. The opinion of the district court (App. 11-19) is reported at 904 F.Supp. 828.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 10) was entered on June 20, 1995.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States.

STATEMENT

On April 19, 1994, two police officers of respondent Arlington Heights, Illinois arrested petitioner at his place of business and charged him with operating a business without a license, in violation of a fine-only municipal ordinance.[1]

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1. Plaintiff is the principal of a telemarketing firm. Section 14-3001 of the Arlington Heights Village Code provides that "businesses hereinafter enumerated in Section 14-3002 shall be licensed in accordance with the provisions of this Code." Section 14-3002 contains an extensive list of businesses and includes a catch-all provision covering "[a]ny and all business enterprises not named elsewhere in this Code."

(App. 15.) As required by a municipal policy,[2] the officers transported plaintiff to the police station where they locked him into an interrogation room for about an hour. (App. 12.) While plaintiff was in police custody, his spouse obtained the business license (id.) and the ordinance charge was dismissed at plaintiff's first court appearance. (Id.) Following the conclusion of the state court proceedings, petitioner brought an action against the arresting officers and Arlington Heights under 42 U.S.C. §1983 in the district court.

One of petitioner's claims in his civil right complaint was that respondent's policy of requiring full custodial arrests for violation of its fine-only business license ordinance resulted in an unreasonable seizure under the Fourth Amendment.[3] (Complaint, par. 5.) Petitioner argued that a full custodial arrest for a fine-only ordinance violation not involving a breach of the peace is unreasonable under the Fourth Amendment.

Petitioner argued in the district court that his business was not subject to the licensing ordinance. The district court resolved this issue against petitioner. (App. 15-16.) Petitioner does not arise any question involving the applicability of the ordinance in this Court.

2. Respondent admitted the existence of the challenged policy in the district court. (App. 12.)

3. Petitioner also asserted that he had been arrested without probable cause and that, before arresting him, the individual officers had conducted an unreasonable search of petitioner's business. The district court found against petitioner on the probable cause to arrest issue. (App. 15-16.) Neither claim is at issue in this proceeding: petitioner did not challenge the probable cause ruling on appeal and the parties settled the unreasonable search claim.

The district court found that the arresting officers had visited petitioner's business "to gather evidence to put him out of business," (App. 14), but concluded that "the Village policy requiring custodial arrests for violations of its business-license ordinance does not offend the Fourth Amendment." (App. 19.)

The court of appeals affirmed, holding that a municipality may require full custodial arrests for violation of a fine only business license ordinance to "prevent[] Ricci from continuing to violate a law" (App. 7) and "in order to ensure compliance with the ordinance and in order to complete the necessary paperwork." (Id.) In the view of the Seventh Circuit, petitoner could not complain about the reasonableness of his arrest because "a neutral magistrate following Illinois law would surely have issued a warrant in this case."

REASONS FOR GRANTING THE WRIT

The Court has yet to decide on whether the common law rule prohibiting warrantless arrests in misdemeanor cases that do not involve a breach of the peace is part of the reasonableness requirement of the Fourth Amendment. As Mr. Justice Stevens noted in *Robbins v. California*, 453 U.S. 420 (1981) (dissenting opinion), "the Court has not directly considered the question whether 'there are come constitutional limits upon the use of "custodial arrests" as the means for invoking the criminal process when relatively minor offenses are involved.'"[4] 453 U.S. at 450 n.11.

A warrantless arrest "is a species of seizure required by the [Fourth] Amendment to be reasonable." *Payton v. New York*, 445 U.S. 573, 585 (1980). Although the Court has

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4. Quoting 2 W. LaFave, Search and Seizure, §5.2, p. 290 (1978).

held that a warrantless arrest in a public place is constitutionally reasonable if the arresting officer has probable cause to believe the suspect is a felon, *United States v. Watson*, 423 U.S. 411, (1976), the Court has not considered whether the common law rule permitting warrantless arrests for misdemeanors only "to suppress breaches of the peace."[5] is part of the reasonableness calculus.

In his concurring opinion in *Gustafson v. Florida*, 414 U.S. 260 (1973), Mr. Justice Stewart observed that "[i]t seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." 414 U.S. at 266-67 (concurring opinion). The motorist in *Gustafson*, however, had conceded the reasonableness of his custodial arrest for a minor motor vehicle violation.

Justice Stewart's concerns in *Gustafson* are rooted in the common law rule that, without a warrant, a police officer could not make an arrest for a non-felony offense unless the offense involved a breach of the peace. 2 LaFave, *Search and Seizure* (1996), §5.1(b), p. 13. A peace officer at common law had "no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence." *Halsbury's Laws of England*, vol. 9, part. III, 612, cited in *Carroll v. United States*, 267 U.S. 132, 156 (1925),

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5. *Carroll v. United States*, 267 U.S. 132, 156-57 (1925), citing 1 Stephen, *History of Criminal Law*, 193.

Respondent's municipal policy requiring custodial arrests for violation of its fine-only business license ordinance is not intended to suppress any breach of the peace; rather, as the Seventh Circuit observed, respondent requires full custodial arrests "in order to ensure compliance with the ordinance and in order to complete the necessary paperwork" (App. 7.)

Vesting a police officer with the power to make a warrantless arrest to "ensure compliance" is a step to a police state — the power to make arrests to "ensure compliance" makes the arresting officer the prosecutor and judge in a summary prosecution for an alleged violation of a fine-only ordinance. This broad and unregulated power undercuts the role of the Fourth Amendment of preserving "one of the most fundamental distinctions between our form of government, where officers act under the law, and the police state where they are the law." *Johnson v. United States*, 333 U.S. 10, 17 (1948).

The central purpose of the Fourth Amendment was to curb the discretion vested by "general warrants: that placed "the liberty of every man in the hands of every petty officer." *Boyd v. United States*, 116 U.S 616, 625 (1886), quoting the remarks of James Otis. This is precisely the result of the rule adopted by the Seventh Circuit in this case, which authorizes police to make full custodial arrests "to ensure compliance" (App. 7.)

An arrest — even one "to ensure compliance" — "is abrupt, is effected with force or threat of it, and often in demeaning circumstances." *United States v. Dionisio*, 410 U.S. 1, 10 (1973). "An arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). An arrest made solely "to ensure compliance with the

ordinance" flouts core principles of the Fourth Amendment.

The federal courts of appeals which have considered this issue have reached conflicting results. In *United States v. Mota*, 982 F.2d 1384 (9th Cir.1993) the defendants had been arrested for selling hot corn-on-the-cob from a shopping cart without a required license; the Ninth Circuit held that the reasonableness standard of the Fourth Amendment did not permit a full custodial arrest for this fine only offense. Id. at 1389.

Three years before *Mota*, another panel of the Ninth Circuit stated as black latter law the proposition that an arrest without warrant may be made for "*any offense.*" (emphasis in original) *Higbee v. City of San Diego*, 911 F.2d 377, 379 n.2 (9th Cir. 1990) (cited by the court below at App. 6). The Fourth Circuit has likewise held that full custodial arrests are permissible under the Fourth Amendment for violation of fine-only ordinance violations which do not involve a beach of the peace. *Fisher v. Washington Metro. Area Transit Authority*, 690 F.2d 1133, 1139 n. 6 (4th Cir. 1982).

The state courts have reached varying answers to this question. For example, in Illinois, a municipality may authorize its police officers to make full custodial arrests for violation of an ordinance punishable by fine only. *People v. Edge*, 406 Ill. 490, 94 N.E.2d 359, 363 (1950). The same rule is followed in Wisconsin. *City of Milwaukee v. Nelson*, 149 Wis.2d 434, 439 N.W.2d 562, 570 (1989)

In Indiana, custodial arrests are not permitted for violation of fine only offenses. *State v. Pease* 531 N.E.2d 1207, 1212 (Ind. Ct. of Appeals 1988). Police in Florida may not make custodial arrests for violation of an ordinance requiring that all bicycles be equipped with gongs. *Thomas v. State*, 614 So.2d 468, 470-71 (Fla. 1993). See also *Barnett v. United States*, 5[redacted] A.2d 197, 199 (D.C. 1987) (no custodial arrest for "walking so as to create a hazard"); *State v. Hehman*, 90 Wash.2d 45, 578 P.2d 527, 529 (1978) (no custodial

arrest for minor traffic violation). *Commonwealth v. Wright*, 158 Mass. 149, 33 N. E. 82 (1893) (no custodial arrest for unlawful possession of undersized lobster).

This Court has made plain that common-law principles of arrest are relevant to the Fourth Amendment, *Wilson v. Arkansas*, 115 S.Ct. 1915 (1995), especially to questions of "reasonableness." *Whren v. United States*, 116 S.Ct. 1769, 1777 (1996). Certiorari should be granted in this case to resolve the important and undecided question of whether the common law rule prohibiting warrantless arrests in misdemeanor cases that do not involve a breach of the peace is part of the reasonableness requirement of the Fourth Amendment.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

September, 1997

KENNETH N. FLAXMAN
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603
Attorney for Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2229

RANDALL RICCI,

Plaintiff-Appellant,

v.

VILLAGE OF ARLINGTON, HEIGHTS
A MUNICIPAL CORPORATION,
ANDREW WHOWELL and JEROME LEONARD

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 7732 **Elaine E. Bucklo,** *Judge.*

ARGUED DECEMBER 2, 1996--DECIDED JUNE 20, 1997

Before CUMMINGS, EASTERBROOK and ROVNER, Circuit Judges,

ROVNER, Circuit Judge. Randall Ricci was arrested for operating a business without a license, in violation of an Arlington Heights, Illinois ordinance. He subsequently sued the Village of Arlington Heights and the two arresting officers pursuant to 42 U.S.C. sec. 1983, claiming the defendants violated his civil rights by subjecting him to full custodial arrest for violation of a fine-only ordinance. Because we find the arrest reasonable for Fourth Amendment purposes, we affirm the district court's grant of summary judgment in favor of the defendants.

I. BACKGROUND

Ricci owns Rudeway Enterprises, a telemarketing business that sells advertising and conducts fundraising for the Combined Counties Police Associations, an Illinois labor union. In early 1994, the Arlington Heights police department began receiving complaints from citizens who were the targets of telephone solicitations conducted by Ricci's business. Detective Whowell investigated Rudeway and determined that Ricci lacked the business license required by Village ordinance. Whowell also discovered an outstanding warrant for the arrest of one of Ricci's employees. Thereafter, Whowell and fellow officer Jerome Lehnert[1] went to Ricci's place of business and arrested the employee pursuant to the warrant. At the same time, according to facts alleged by Ricci and undisputed by the defendants. the officers searched some of Ricci's business papers, even though they had no warrant to do so, in hopes of finding material that would allow them to close down Rudeway. The officers then asked Ricci if he had a business license and he confirmed that he did not. The officers arrested Ricci for violating Section 9-201 of the Village of Arlington Heights Code of Ordinances, which makes it unlawful to operate a business without a license.

Pursuant to Village policy, Ricci was taken to the Arlington Heights police station and locked in an interview room for approximately one hour while the officers prepared

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1. Plaintiff apparently misspelled Officer Lehnert's name in the complaint and the error was never corrected. We will use the correct spelling.

1. Section 14-3002 of the Village of Arlington Heights Code of Ordinances requires local businesses to be licensed through the Village.

an arrest sheet and a Local Ordinance Complaint, and approved and issued a bond receipt. After the paperwork was completed, Ricci was released on a recognizance bond. His wife obtained the business license while he was in custody, and when his case came to court, the charges were dismissed upon presentation of the newly obtained license. According to Ricci, the police knew when they arrested him that he would be released on bond, that he would purchase a business license, and that the charges would be dismissed.

Ricci brought a three count complaint against the Village of Arlington Heights and the police officers who arrested him, alleging that the officers engaged in an unconstitutional search of the premises, arrested him without probable cause, and violated his civil rights by subjecting him to full custodial arrest for committing a fine-only offense. The parties settled the first claim, and Ricci does not appeal from the court's dismissal with prejudice of the second claim. Thus, the only claim before us is the one attacking the Village policy that requires full custodial arrest for violations of the business license ordinance.

The district court dismissed that claim, noting that the only two circuits to rule on the issue both found custodial arrests for local ordinance violations to be constitutionally acceptable. See *Fisher v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1133 (4th Cir. 1982) (refusing to find unconstitutional an arrest for violation of a fine-only ordinance prohibiting eating on trains); *Higbee v. City of San Diego*, 911 F.2d 377 (9th Cir. 1990) (finding constitutionally permissible the detention for processing of misdemeanor arrestees who were operating a "peep show" in violation of local ordinance, even though officers could have issued field release citations under city policy). Further, the district court found, the result would be the same under the common law rule that an officer could make a custodial arrest for a misdemeanor only if the crime was committed in the officer's presence. Here, Ricci admitted to the police that he did not

have the requisite business license, and thus the misdemeanor was committed in the officers' presence. Finally, the district court declined to apply Justice Stewart's suggestion, expressed in a concurrence, that a custodial arrest for a misdemeanor--in that case a minor traffic offense--might violate a person's rights under the Fourth and Fourteenth Amendments. *See Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (Stewart, J., concurring). The district court noted that the Supreme Court had not adopted an interpretation of reasonableness under the Fourth Amendment that required the court to consider the permitted punishment in determining whether an arrest was reasonable, and the court declined to impose that interpretation without further guidance from the Supreme Court. In so deciding, the district court joined with the Fourth Circuit which also refused to apply such an interpretation to the reasonableness test until the Supreme Court required it. *Fisher*, 690 F.2d at 1139 n.6.

On appeal, Ricci argues that under the common law, full custodial arrest for violation of a fine-only ordinance is constitutionally permissible only if the violation involves a breach of the peace. The Village, in turn, contends that where probable cause exists to believe a crime is being committed, and where state law authorizes arrest for the violation, an arrest is reasonable under the Fourth Amendment.

II. DISCUSSION

We have previously held, in the context of a discussion about pretextual arrest, that the reasonableness of an arrest depends on the existence of two objective factors:

> First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense. Second, was the arresting officer authorized by state and or municipal law to effect a custodial arrest for the particular offense. If these two factors are present, we believe that an arrest is necessarily reasonable under the fourth

> amendment. This proposition may be stated in another way: so long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional. *United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989).

Ricci does not dispute that the officers had probable cause to believe he was violating the business license ordinance. He did, after all, admit to the arresting officers that he did not have the license, and the police had already confirmed that fact through independent investigation. Nor does Ricci dispute that the arresting officers were authorized by state or local law to effect custodial arrest for this particular offense. Illinois law authorizes a peace officer to arrest a person when the officer "has reasonable grounds to believe that the person is committing or has committed an offense." 725 ILCS 5/107-2(1)(c). The Illinois law does not differentiate between offenses punishable by fine only and offenses punishable by a possible (or certain) term of imprisonment. Village policy also authorized the arrest in order to effectuate the processing of the paperwork associated with a bondable offense. Under the two-pronged test described in Trigg, the arrest would, therefore, pass constitutional muster.

But Ricci argues that the common law requires a different result, in essence adding a third prong to the Trigg test. He contends that the court should also weigh the severity of the punishment associated with the offense and should consider whether the offense at issue constituted a breach of the peace. In the case of an offense punishable by fine only, where the offense does not constitute a breach of the peace, Ricci contends we should adopt a per se rule that such arrests are unreasonable for Fourth Amendment purposes. In support of this new rule, Ricci cites *Gramenos v. Jewel Co.*, 797 F.2d 432 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987), where we recognized that full custodial arrest for any crime on probable cause might not comport with the Fourth Amendment. We noted in *Gramenos* that under the common law, an officer could make a custodial arrest for a

misdemeanor only if the crime was committed in the officer's presence. 797 F.2d at 441. We also noted that Illinois had altered the common law rule to allow full custodial arrest for any crime on probable cause, whether or not the offense was committed in the officer's presence. But because the arrestee in that case did not challenge the Illinois law that authorized arrests for misdemeanors, we declined to rule on the constitutional propriety of the Illinois statute.

The arrest in the instant case comports with the common law rule as stated in *Gramenos*. That is, Ricci committed the offense in the officers' presence. But Ricci also contends that the common law allowed arrest for a misdemeanor committed in an officer's presence only if that crime constituted a breach of the peace. Because operating a business without a license does not constitute a breach of the peace, Ricci argues, full custodial arrest is not reasonable under the Fourth Amendment. But the common law rule has been relaxed to include arrests for offenses other than breaches of the peace. *Higbee*, 911 F.2d at 379 n.2 (arrest for operating a

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1. In addition to *Gramenos*, Ricci cites *Commonwealth v. Wright*, 158 Mass. 149, 33 N.E. 82 (1893). In that case, the defendant was arrested without a warrant for the misdemeanor offense of possessing undersized or so-called "short" lobsters with intent to sell. The court held, "We are . . . of [the] opinion that for statutory misdemeanors of this kind, not amounting to a breach of the peace, there is no authority in an officer to arrest without a warrant, unless it is given by statute." 158 Mass. at 158-59, 33 N.E. at 86. First, as we discuss below, Ricci does not complain about the failure of the officers to procure a warrant. Rather, he complains about the reasonableness of any arrest for a fine-only offense. Second, the parties agree that there was statutory authority in the instant case allowing the officers to arrest Ricci for violating a Village ordinance.

"peep show"). *See also, Fisher*, 690 F.2d at 1139 n.6 (arrest for eating on a train). The rationale for allowing warrantless arrests for breaches of the peace was to promptly suppress breaches of the peace. Here the arrest served a similar purpose. The arrest prevented Ricci from continuing to violate a law he had been admittedly violating for some time.

No variation of the common law rule requires that we consider the severity of the punishment in deciding if the arrest was reasonable. Nor, as the district court noted, has the Supreme Court adopted an interpretation of reasonableness under the Fourth Amendment that would require this Court to consider the permitted punishment in determining whether an arrest was reasonable. Nonetheless, we note that Ricci was accumulating fine liability at a rate between $5 and $500 per day during the period of violation, which he admitted had been going on for an extended period of time. See Village of Arlington Heights Code of Ordinances, section 9-201 ("Any person violating this section shall be fined not less than Five Dollars ($5.00) nor more than Five Hundred Dollars ($500.00) for each offense. A separate offense shall be deemed committed on each day during or on which a violation occurs or continues.") By the time he was arrested, Ricci was facing a potential fine of tens of thousands of dollars. He admitted to the officers that he was currently violating the statute. The officers held him for only one hour, the length of time it took to process the paperwork associated with the arrest. We cannot call such an arrest unreasonable for Fourth Amendment purposes. The Village of Arlington Heights was entitled to arrest Ricci in order to ensure compliance with the ordinance and in order to complete the necessary paperwork.

Moreover, we decline to set a per se rule for deciding the reasonableness of an arrest for Fourth Amendment purposes. Such an approach conflicts with the Supreme Court's analysis in *Whren v. United States*, 116 S.Ct. 1769 (1996). In general, every Fourth Amendment case, because it turns upon a reasonableness determination, involves a balancing of all

relevant factors. *Whren*, 116 S.Ct. at 1776-77. Thus, we must consider the unique facts of each case in order to make that determination. It is true that, with rare exceptions, "the result of that balancing is not in doubt where the search or seizure is based upon probable cause. . . . Where probable cause has existed, the only cases in which we have found it necessary actually to perform the conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." Id. That does not change the individualized assessment we make in each case. But Ricci's arrest, which was based on probable cause, is not one of those extraordinary cases that require us to conduct a balancing analysis.

Two final points: first, at oral argument, Ricci attempted to recast his argument as one based on the warrant clause of the Fourth Amendment, rather than on the reasonableness clause. Ricci contended at oral argument that no neutral magistrate would have issued a warrant in this case. Ricci waived this argument by not raising it in his brief and we therefore need not address it. *United States v. Beltran*, 109 F.3d 365, 371 (7th Cir. 1997) (argument raised for the first time at oral argument waived for purposes of appeal); *United States v. Shorter*, 54 F.3d 1248, 1256 n.19 (7th Cir. 1995), cert. denied, 116 S.Ct. 250 (1995) (argument not raised in brief is deemed waived). Second, Ricci raised a parade of horribles in his reply brief, speculating that under the same rationales proffered by the Village, a municipality could, with impunity, require the use of leg irons, shackles and handcuffs

1. In fact, Ricci conceded at oral argument that had a warrant been issued in this case, the arrest would have been reasonable under the Fourth Amendment. Such a concession eviscerates Ricci's reasonableness argument. Further, a neutral magistrate following Illinois law would surely have issued a warrant in this case.

for misdemeanor arrests, could insist that all misdemeanor arrestees be strip searched and subjected to full body cavity searches, and could order police to "shoot to kill" arrestees, regardless of the offense. Such histrionics do little for the credibility of Ricci's already thin arguments. "It is often possible to parade a list of horribles as to how a criminal statute might unjustly be applied. However, the focus needs to be how it could be properly applied in this case." *United States v. Berry*, 60 F.3d 288, 293 (7th Cir. 1995). None of these things happened to Ricci, and indeed we might have an entirely different case had the police acted in such a manner. But here the police arrested Ricci based on probable cause, brought him to the police station and locked him in an interview room for an hour while they processed the necessary paperwork. They arrested him in compliance with Illinois law and Village ordinances. Today we also hold they did so in conformance with the reasonableness requirement of the Fourth Amendment. Therefore, the order of the district court granting summary judgment in favor of the defendants is

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2229

RANDALL RICCI,

Plaintiff-Appellant,

v.

VILLAGE OF ARLINGTON, HEIGHTS
A MUNICIPAL CORPORATION,
ANDREW WHOWELL and JEROME LEONARD

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 94 C 7732 **Elaine E. Bucklo**, *Judge.*

[June 20, 1997]

JUDGMENT — ORAL ARGUMENT

Honorable Walter J. Cummings, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Ilana D. Rovner, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RANDALL RICCI,

Plaintiff,

No. 94 C 7732 *v.*

VILLAGE OF ARLINGTON, HEIGHTS
A MUNICIPAL CORPORATION,
ANDREW WHOWELL and JEROME LEONARD

Defendants.

MEMORANDUM OPINION AND ORDER

Defendants, the Village of Arlington Heights ("the Village") and two of its police officers, Andrew Whowell and Jerome Lehnert, have filed a motion requesting this court to enter summary judgment in their favor on the complaint filed by plaintiff, Randall Ricci. For the reasons stated below, the defendants' motion is denied in part and granted in part.

I. Undisputed Facts

Plaintiff Randall Ricci has filed this action under 42 U.S.C. § 1983, alleging that defendants have violated his rights guaranteed by the Fourth and Fourteenth Amendments. Mr. Ricci makes three separate claims. First, he claims that Officers Whowell and Lehnert engaged in a warrantless search of his business premises.[1] Second, he claims that he

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1. Plaintiff has incorrectly spelled Mr. Lehnert's name in his complaint. The correct spelling will be used in this opinion.

was arrested without probable cause. Finally, Mr. Ricci alleges that the Village's policy prescribing full custodial arrests for violations of its municipal ordinance requiring a business license is unconstitutional. A description of the incident in question follows.

On April 19, 1994, Officers Whowell and Lehnert entered the business premises of Rudeway Enterprises, a telemarketing firm run by Mr. Ricci and located in the Village. The Officers were there to arrest Daniel Dugo, an employee of Rudeway Enterprises for whom they had a warrant. According to Mr. Ricci, they were also there to gather evidence to put him out of business.[2] Whether true or not, defendants admit that prior to going to Rudeway, they had determined that Rudeway did not have a Village of Arlington Heights business license.

After entering the Rudeway business premises, Officer Whowell asked Mr. Ricci whether he had a Village business license for Rudeway Enterprises, as required by the Arlington Heights Village Code of Ordinances ("the Village Code"). Mr. Ricci stated that he did not have a license. Because Mr. Ricci was operating Rudeway Enterprises without a Village business license, he was arrested and taken to the Village Police Department. He was held there for about an hour, while the police performed the necessary administrative functions, and then released on a recognizance bond.

Mr. Ricci's wife ultimately obtained a Village business license for Rudeway Enterprises. The charge against Mr. Ricci was consequently dropped.

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2. This fact is admitted by defendants' failure to respond to Mr. Ricci's Local Rule 12(N) Statement. *See* Local Rule 12(M); *Schulz v. Serfilco*, 965 F.2d 516, 519 (7th Cir. 1992).

II. Standard of Review

Summary judgment disposes of a claim before trial in those cases where a trial is unnecessary and will only result in delay and expense. *Ford Motor Credit Co. v. Devalk Lincoln-Mercury, Inc.*, 600 F.Supp. 1547, 1549 (N.D. I11. 1985). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ. P. 56(c). A genuine issue of fact exists when a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III. Count I: The Search

Mr. Ricci contends that Officer Whowell engaged in an unconstitutional search by reading his business documents on his premises without a warrant. The only evidence that Mr. Ricci points to in support of this claim is his statement that he saw Officer Whowell pick up and inspect a 3X5 index card off a desk. Mr. Ricci says the card contained information about a client. Mr. Ricci says he saw the officer pick up the card as they were walking toward him.

In reading his index card, the defendant officers may or may not have conducted a "search" within the meaning of the Fourth Amendment. To establish that a search occurred, Mr. Ricci bears the burden of proving that he had a legitimate expectation of privacy in the contents of the index card. *See, e.g., United States v. Myers*, 46 F.3d 668, 669 (7th Cir.) ("A search within the meaning of the Fourth Amendment occurs only when a reasonable expectation of privacy is infringed."), *cert. denied*, 116 S.Ct. 213 (1995); *United States v. Duprey*, 895 F.2d 303, 309 (7th Cir. 1989) ("A defendant objecting to the search of a particular area bears the burden of proving a legitimate expectation of privacy in the area searched."), *cert. denied*, 495 U.S. 906 (1990). "A reasonable expectation of privacy exists when '(1) the complainant exhibits an actual

(subjective) expectation of privacy and, (2) the expectation is one that society is prepared to recognize as "reasonable." " *United States v. Ruth*, 65 F.3d 599, 604 (7th Cir. 1995) (quoting, *Myers, supra*, 46 F.3d at 669).

Even if Mr. Ricci establishes that a search occurred, in order to get more than nominal damages he must establish an actual injury. *See Memphis Community School District v. Stachura*, 477 U.S. 299, 308 n.12 (1986) ("[N]ominal damages . . . are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury."); *Carey v. Piphus*, 435 U.S. 247 (1978) (damages may not be presumed for violations of due process clause). Although Mr. Ricci has alleged injury resulting from his arrest, he has not alleged any injury resulting from defendants reading his index card. Therefore, because I rule for the defendants on his other claims, Mr. Ricci will likely only receive nominal damages at trial. *Cartwright v. Stamper*, 7 F.3d 106 (7th Cir. 1993)[3] (plaintiff alleging emotional distress from search in violation of the Fourth Amendment received only $1 from jury) Despite the absence of a compensable injury, however,

3. In Cartwright, the plaintiffs did not contest the jury verdict. They did, however, contest the fact that the court had, due to the minimal damage award, reduced the lodestar amount of their attorney's fees by one-third. On appeal, the Seventh Circuit held that if a nominal damage award is de minimis, the court may deny all attorney's fees to the plaintiff. 7 F.3d at 109. The court adopted a three-factor test for courts to apply in determining when a nominal damage award is de minimis. Id. Thus, even though Mr. Ricci would be a "prevailing party" if the jury awards him nominal damages, he would not necessarily be entitled to his full attorney's fees. *See Farrar v. Hobby*, 113 S.Ct. 566 (1992) (denying attorney's fees where plaintiff recovered only $1).

Mr. Ricci's claim may go forward; whether, by reading an index card, the defendants executed an "unreasonable search" within the meaning of the Fourth Amendment is a question of fact precluding summary judgment.

IV. Count II: Unlawful Arrest

Mr. Ricci claims that he was arrested without probable cause, in violation of the Fourth and Fourteenth Amendments. "Police officers have probable cause to make an arrest where 'the facts and circumstances within their knowledge and of which they have reasonably trustworthy information are sufficient to warrant a prudent man in believing that the suspect has committed or was committing an offense."' *United States v. Levy*, 990 F.2d 971, 973 (7th Cir. 1993) quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

Plaintiff admits that the officers had a reasonable basis to believe that Rudeway Enterprises did not have a Village business license. He contends, however, that no ordinance required him to have such a license, and he therefore committed no offense for which he could be arrested. I disagree.

Section 14-3001 of the Village Code provides that "businesses hereinafter enumerated in Section 14-3002 shall be licensed in accordance with the provisions of this Code." Section 14-3002 contains an extensive list of businesses and includes a catch-all provision covering "[a]ny and all business enterprises not named elsewhere in this Code." Telemarketing is not named explicitly in the list, but does fall within the catch- all provision. Rudeway Enterprises was required to have a Village business license.

Mr. Ricci further contends that there is no ordinance authorizing his arrest as a corporate officer of a business operating without a license. Again, I disagree. Section 9-201 of the Village Code renders "it . . . unlawful for any person to conduct, engage in, maintain, operate, carry on or manage a business . . . for which a license is required by an provision

of this Code without first having obtained a license for such business." On the day of his arrest, Mr. Ricci was operating Rudeway Enterprises without a business license. The officers observed Mr. Ricci committing this unlawful act and consequently arrested him. The officers had probable cause to do so.

V. Count III: Municipal Liability

Mr. Ricci argues that the Village policy requiring full custodial arrests for violations of the business-license ordinance is unconstitutional. Although the Seventh Circuit has never addressed the question, the Fourth and Ninth Circuits have both found custodial arrests for local ordinance violations to be constitutionally acceptable. Additionally, the Supreme Court has questioned whether custodial arrests are appropriate for misdemeanor offenses, but has never explicitly addressed the question. *See Robbins v. California,* 453 U.S. 420, 450 n.11 (1981) (Stevens, J., dissenting) (acknowledging Justice Stewart's position in Gustafson and noting that the Court had not yet addressed any limitations on custodial arrests for minor offenses); *Gustafson v. Florida* 414 U.S. 260, 266 (1973) (Stewart, J., concurring) (declaring that "a persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments").

The Fourth and Ninth Circuits have not followed Justice Stewart's intimations. In *Fisher v. Washington Metropolitan Area Transit Authority,* 690 F.2d 1133 (4th Cir. 1982), the plaintiff had been arrested for violating a county ordinance prohibiting eating on transit authority trains. She sued under §1983, claiming, *inter alia,* that her arrest was per se unconstitutional because the offense of eating on a train was punishable only by a fine and not by imprisonment. Id. at 1139 n.6. Without a more direct sign from the Court than an

acknowledgment of the issue, however, the Fourth Circuit refused to find custodial arrests for ordinance violations to be unconstitutional. Id.

More recently, in *Higbee v. City of San Diego,* 911 F.2d 377 (9th Cir. 1990), the court addressed the constitutionality of the plaintiffs' arrest for violating a municipal ordinance regulating "peep show establishments." The plaintiffs were sales clerks operating a peep show that did not conform to the city's municipal code requirements. Id. at 378. The clerks argued that they could have been issued a field release citation rather than being taken to jail for administrative processing of their arrest. Id . at 379. They sought damages under §1983, claiming that their treatment by the police was unreasonable within the meaning of the Fourth Amendment.

The court affirmed the district court's grant of summary judgment for the defendants. While recognizing that the police could have used the lesser field release citation, the court held that the Fourth Amendment did not require it. "[P]laintiffs did not have a constitutional right to immediate liberty once they were subjected to a lawful arrest." Id. at 379. The court found it constitutionally permissible to detain an arrestee for post- arrest administration, even for the misdemeanor offense of violating a municipal ordinance. Id.

In sum, the two federal courts to have addressed whether full custodial arrest for a minor violation is unreasonable under the Fourth Amendment have both held that it is not.

In opposition, Mr. Ricci points to dicta in *Gramenos v. Jewel Companies,* 797 F.2d 432 (7th Cir. 1986). In *Gramenos,* the Seventh Circuit admitted that "probable cause" alone may not render an arrest "reasonable" within the meaning of the Fourth Amendment. *Id.* at 441. Because the plaintiff in *Gramenos* did not promote this argument, however, the court simply found probable cause and did not address a separate reasonableness question. *Id.*

In discussing the issue, the court noted the common law rule allowing "an officer [to] make a custodial arrest for a misdemeanor only if the crime was committed in his presence." 797 F.2d at 441. In *Gramenos*, the arrest was based solely on the statement of a third-party; the crime was not committed in the officer's presence. Id. at 433-34. *Gramenos* shows, therefore, only that the Seventh Circuit appeared willing to incorporate into the Fourth Amendment reasonableness requirement the common law rule requiring an officer to witness a misdemeanor before arresting someone for it.

Even if I apply this common law rule, Mr. Ricci's arrest would still be reasonable. He committed his offense of operating a business without a license in the presence of Officers Whowell and Lehnert.[4] His arrest by them was therefore reasonable.

Mr. Ricci also points to a recent Supreme Court case, *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995), to show that the Court sanctions an original intent in Fourth Amendment inquiries. The focus on original intent in constitutional questions it not a new phenomenon. *See id.* at 1916 (citing Supreme Court cases looking at original intent of Fourth Amendment as early as 1925). Thus the Supreme Court's silence regarding custodial arrests for minor offenses is no less valuable after *Wilson*. I agree with the Fourth Circuit that

> [u]ntil such an interpretation of the reasonableness requirement of the fourth amendment is adopted by the Court, we must assume that it applies alike to all criminal offenses — without regard to severity of permitted punishment — to allow reasonable custodial arrests as the traditional means for invoking the criminal process.

4. Defendants admit they knew Mr. Ricci was operating a business without a license before their arrival at his business. He ahs not argued that this knowledge required the police to obtain a warrant rather than rely on his admission of the fact in their presence.

I find that the Village policy requiring custodial arrests for violations of its business-license ordinance does not offend the Fourth Amendment.

VI. Conclusion

For the reasons set forth above, summary judgment is denied with respect to Count I. Summary judgment is granted on Counts II and III.

Dated: November 7, 1995

ENTER ORDER:

Elaine E. Bucklo
United States District Judge